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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 484

THE MANUFACTURERS LIGHT AND HEAT COMPANY,
THE OHIO FUEL GAS COMPANY
Petitioners,

v.

TEXAS EASTERN TRANSMISSION CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Dated October 19, 1963.

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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To the Honorable Supreme Court of the United States:

Respondent, Texas Eastern Transmission Corporation, files this Memorandum Brief in Opposition to the Petition for Writ of Certiorari filed by The Manufacturers Light and Heat Company and The Ohio Fuel Gas Company. For the purpose of brevity the Petitioners will be referred to as "The Columbia Companies".

QUESTION PRESENTED

Whether the Court below correctly interpreted the terms of the settlement agreed to by all parties in Docket No. G-1964, including the Columbia Companies, and approved by Order of the Federal Power Commission issued October 9, 1953.

STATEMENT OF THE CASE

This case involves the interpretation of a settlement agreement — a private contract — approved by order of the Federal Power Commission issued October 9, 1953 in Docket No. G-1964. As stated by the Court below (306 F. 2d 346):

> "What is involved is a settlement agreement — a voluntary settlement contract made by parties in an adversary position, and thereafter approved by the Commission as the basis for tariff rates. The tariffs or rates, as such, are likewise not in question. The dispute is an everyday run-of-the-mill controversy over the interpretation and meaning of the settlement agreement."

In May, 1952 Texas Eastern filed an annual rate increase in Docket No. G-1964 of approximately $40,000,000 pursuant to Section 4(e) of the Natural Gas Act[1] (R. 26). After the presentation of evidence by Texas Eastern, the parties negotiated a settlement under which the proposed annual rate increase was reduced to $27,000,000 (R. 58-59). This settlement was agreed to by all parties, including the Columbia Companies, and was incorporated in and finally approved by the Commission's order of October 9, 1953 (R. 58-66).

At the time this settlement of Texas Eastern's rate case in Docket No. G-1964 was consummated, two rate cases were pending before the Commission involving United Gas Pipe Line Company, a supplier of gas to Texas Eastern. One of these rate cases involved a proposed increase in United's rates for gas delivered to Texas Eastern at Longview, Texas, filed by United under Section 4(e) of the Natural Gas Act in Docket No. G-2019. The other rate case was an

[1] 15 U.S.C. §717c(e)

investigation of all of United's rates instituted by the Federal Power Commission under Section 5(a)[2] of the Natural Gas Act in Docket No. G-1142. This rate case involved, *inter alia*, an investigation of United's rate for gas delivered to Texas Eastern at Kosciusko, Mississippi.

In the settlement agreement of Texas Eastern's rate case in Docket No. G-1964, the parties provided for refunds and rate reductions by Texas Eastern conditioned upon the ultimate outcome of the pending Section 4(e) rate increase filed by United in Docket No. G-2019, but did not propose any such refund and rate reduction requirements with respect to the Section 5(a) investigation in Docket No. G-1142. This agreement, which became Finding (2)(a) of the Commission's Order approving the settlement, provided as follows (R. 63):

> "(ii) If, as a result of a final judgment in FPC Docket No. G-2019, Texas Eastern receives a refund of any portion of amounts paid to United Gas Pipe Line Company for gas delivered at Longview, Texas, then Texas Eastern shall in turn promptly, . . . distribute among all of its firm gas customers . . . the total dollars so refunded to Texas Eastern. . . . * * *. If * * * United Gas Pipe Line Company, as a result of a final judgment in Docket No. G-2019 * * * places in effect tariffs providing for lower sales rates to Texas Eastern than are currently in effect as of such date, . . . then Texas Eastern shall file a reduction in the commodity charge of its rates in Rate Zones C and D which will as nearly as possible be equal to the combined reduction in rates charged Texas Eastern by United Gas * * *. If Texas Eastern is required to make a reduction in its rates pursuant to this agreement, such reduction, to the extent that it became necessary as a result of a final judgment in Docket No. G-2019, shall be made effective as of the date of such final judgment. * * *."

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[2] 15 U.S.C. §717d(a)

The present controversy boils down to what the parties meant by Finding (2)(ii), *i.e.*, a determination of Texas Eastern's rate reduction and refund obligations under this provision of the settlement. It is Texas Eastern's position that its obligations under Finding (2)(ii) were clearly limited to any refunds or rate reductions received by Texas Eastern from United as a result of a final judgment in Docket No. G-2019. It is the position of the Columbia Companies that Texas Eastern was also required to make additional refunds to reflect any reduction in United's rates for gas delivered at Kosciusko, Mississippi, as a result of the final judgment entered in the Commission's Section 5(a) rate investigation of United in Docket No. G-1142.

After the settlement of Texas Eastern's rate case in Docket No. G-1964, the Commission by Opinion No. 277, issued November 2, 1954, approved a settlement of United's rate cases in Dockets Nos. G-1142 and G-2019 and other United rate proceedings. This Opinion No. 277 directed United to refund $385,569 to Texas Eastern for increased charges collected by United in the Section 4(e) proceeding in Docket No. G-2019 involving the delivery of gas to Texas Eastern at Longview, Texas. Opinion No. 277 also ordered United to reduce its rates for the sale of gas to Texas Eastern at Kosciusko, Mississippi, in the Section 5(a) proceedings in Docket No. G-1142. As a result of this reduction, Texas Eastern realized an annual reduction in the cost of gas purchased from United in the amount of $1,071,385 (R. 87).

Opinion No. 277 was appealed by Mississippi River Fuel Corporation. During the pendency of such appeal, United increased its annual rates to Texas Eastern by approximately $3,900,000 on April 1, 1956 (Docket No. G-9547) and by approximately $2,000,000 on November 16, 1956 (Docket No. G-10,592) (R. 88). These two new rate increases more

than offset the reduction in United's rates to Texas Eastern in Docket No. G-1142 and resulted in an annual rate level approximately $4,700,000 higher than the level of United's rates to Texas Eastern at the time of the settlement of Texas Eastern's rate case in Docket No. G-1964.

After the conclusion of the appeal of Opinion No. 277 by Mississippi River Fuel Corporation, Texas Eastern contended that its refund obligation under the above quoted provisions of Finding (2)(ii) of the settlement agreement in Docket No. G-1964 was limited to the $385,569 received from United for gas delivered at Longview, Texas, as a result of the final judgment in United's Docket No. G-2019 (R. 93-94). However, several of Texas Eastern's customers contended that they were entitled to greater refunds. In order to settle the controversy, Texas Eastern tendered or paid to all of its customers a total of $3,477,002.33 which gave "them the full benefit of actual reductions in Kosciusko rates, even though such funds were not legally due." (306 F. 2d at 356). (R. 93-94).

The Columbia Companies were tendered their pro rata share of the settlement payments but voluntarily refused to accept them, contending that Texas Eastern was obligated to make additional refunds (R. 102). They protested to the Commission (R. 101-112), and by letter order dated March 13, 1961 the Commission notified Texas Eastern that the refunds made and tendered under the settlements were insufficient (R. 127-129). The Commission ordered Texas Eastern to make additional refunds and interest payments based on the premise that any reduction in United's rates in Docket No. G-1142 automatically became a rate reduction in Docket No. G-2019 and thus within the purview of Finding (2)(ii) quoted above. Accordingly, when Texas Eastern sought judicial review of the Commission's letter order, the issue was

squarely framed and succinctly summarized by the Court below as follows (306 F. 2d 348):

> "Here the problem is precisely that: when the parties said Docket G-2019, did they mean G-2019? Did they mean G-2019 plus G-1142? Or did they mean, as the Commission now says they did, not only G-2019 and G-1142, but 'any and all rate reductions resulting from United's (the supplier's) rate proceedings?'"

The Court of Appeals held that Texas Eastern's "refund and rate obligations are restricted to those directly set in motion by G-2019 and that, conversely, they do not encompass the rate reductions for gas delivered at Kosciusko as a result of the reductions brought about by the 5(a) proceedings in G-1142" (306 F. 2d 358). In an exhaustive opinion Judge Brown speaking for the Court disposed of the contentions now urged by the Columbia Companies in support of their petition for certiorari. He pointed out that the correctness of the Commission's letter order depended on the correctness of the interpretation of the private settlement contract; that the contract must be read in the setting of the Natural Gas Act; that one sure way to discourage voluntary settlements was for the Commission at the behest of one party to read into the contract "things which are simply not expressed or not there" on the basis that the result is not as good as it ought to have been; that the reference solely to Docket No. G-2019 in the subject settlement agreement was purposeful and that the Commission was "scrupulously precise" in distinguishing between Docket No. G-1142 and Docket No. G-2019; and finally that Texas Eastern will not receive a windfall because the amounts paid or tendered in settlement gave its customers the full benefit of any actual reductions in rates for gas purchased from United at Kosciusko, Mississippi, even though Texas Eastern was not obligated to make such refunds. Because the record was unclear as to the amount

of interest now due the Columbia Companies, the case was remanded to the Commission solely as to that facet of the case. Except for the limited factor of interest, the letter order of the Commission was reversed.

The Columbia Companies sought rehearing. The Commission did not. By order issued April 22, 1963, the Court of Appeals denied rehearing. The Columbia Companies, intervenors in the Court below, now seek certiorari to this Court. The Commission, respondent in the Court below, has not sought certiorari and apparently acquiesces in the court's interpretation of Finding (2)(ii).

The statement of the case set forth in the petition filed by the Columbia Companies is argumentative and inaccurate. The very subject matter of this proceeding — the settlement of Texas Eastern's rate increase in Docket No. G-1964 — is virtually ignored. Instead, the Columbia Companies have directed their statement to the settlement order in Opinion No. 277, where the Commission approved a settlement of various rate proceedings involving United Gas Pipe Line Company in Docket Nos. G-1142, G-1505, G-2019, G-2074, G-2220 and G-2378. Texas Eastern believes that the complex facts underlying this case are accurately set forth in the comprehensive opinion of the Court below. Texas Eastern sees no benefit from a further discussion of the "Statement" in the petition of the Columbia Companies. Nor do the reasons which the Columbia Companies urge for granting the writ warrant an extended reply. Therefore, this memorandum brief in opposition will be limited to a discussion of (1) the spurious assumption that Texas Eastern will receive a windfall as a result of the decision below; (2) the erroneous attempt of the Columbia Companies to inject the Commission's power under Section 4 of the Natural Gas Act into this case which involves solely a matter of contractual interpretation; and (3) the assertion of the Columbia Companies that the decision of

the Court below is not dispositive of Texas Eastern's refund and rate reduction obligation under Finding (2)(ii) of the settlement agreed to in Docket No. G-1964 and will only result in further delay. These matters will be discussed *seriatim*.

REASONS FOR DENYING THE WRIT

1. Texas Eastern Will Not Receive a Windfall at the Expense of the Ultimate Consumers

The principal argument urged by the Columbia Companies is not directed to the merits of the decision rendered by the Court of Appeals. Instead, they assume that the Court's interpretation of the settlement agreement is in error and therefore argue that unless the decision below is reversed Texas Eastern will receive a windfall by retaining rate reductions received from United. Thus, the Columbia Companies state (Pet., p. 16):

> "In immediate effect, the Court's decision deprives ultimate consumers of the right to have determined the entire savings in cost of gas purchased by Texas Eastern from United for the period of August 1, 1954 to November 10, 1957 and to receive the benefits thereof either directly or indirectly."

Of course, there is no evidentiary basis cited to support this self-serving conclusion.

The obvious fallacy in their argument is the assumption that the Court's contract interpretation is in error. However, aside from this fundamental defect, it is clear that Texas Eastern will not receive a windfall as a result of the Court's construction of Finding (2)(ii). Under the settlement in Docket No. G-1964, Texas Eastern agreed to a reduction of approximately $15,000,000 in its proposed annual rate increase (R. 58-66). In addition, Texas Eastern paid or tendered to its customers, including the Columbia

Companies, amounts far in excess of the refunds and rate reductions it received from United for the period of August 1, 1954 to November 10, 1957. It is undisputed that Texas Eastern refunded or tendered the $385,569.00 refund received from United in Docket No. G-2019 (R. 93). Likewise, it is undisputed that in order to compromise the controversy as to the construction of Finding (2)(ii), Texas Eastern under its settlement agreements refunded or tendered to its customers an additional amount which "gives them the full benefit of actual reductions in Kosciusko rates even though such funds were not legally due" (306 F. 2d at 356) plus $1,097,967.33 (R. 93-94). In summary, it is clear from these undisputed facts that the decision of the Court below will not result in a windfall to Texas Eastern at the expense of the ultimate consumers.

The Columbia Companies vigorously urged this same windfall argument in the Court of Appeals. The argument was considered and correctly disposed of when, after extensive discussion, Judge Brown pointed out (306 F. 2d 356):

> "Likewise, the specter of a windfall never materialized. In the 1958 tender made to, and accepted by, all of the customers save the Columbia Companies, element (b), see note 19, *supra*, gives them the full benefit of actual reductions in Kosciusko rates even though such funds were not legally due." (Footnote omitted.)

2. The Decision of the Court Below Involves the Interpretation and Meaning of a Settlement Agreement and Is Not Concerned With the Commission's Powers Under Section 4 and Section 5 of the Natural Gas Act

In its interpretation of the subject settlement agreement, the Court below concluded that "reference to Docket No. G-2019 was purposeful and did not thereby include action taken in G-1142" (306 F. 2d at 354). Judge Brown cited

various reasons to support this conclusion, among which was the following (306 F. 2d at pp. 354-355):

> "The notion that reference to G-2019 casually brought any and all other dockets to which United might be a party into the scope of this indeterminable refund-rate-reduction-obligation' ignores the technical, but profound, distinction between the nature of a § 4 and a § 5 proceeding. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373; FPC v. *Sierra Pacific Power Co.*, 1956, 350 U.S. 348, 76 S. Ct. 368, 100 L. Ed. 388. Since United's conversion tariff covering Kosciusko rates did not make an increase, the parties — all of whom were represented by seasoned hands skilled in the Natural Gas Act — knew positively that the Commission in the § 4(e) proceedings in G-2019 did not have the power, nor did they ever undertake to, alter such rates. The downward changes in that rate could come about only by the Commission § 5(a) general investigation which, all knew equally well, had been pending since 1948 in G-1142."

The Columbia Companies have excerpted a fragment of one sentence from the above quoted paragraph and argued that (Pet., p. 19):

> "The Court's interpretation of 'the technical, but profound, distinction between the nature of a Section 4 and a Section 5 proceeding' under the Natural Gas Act (R. 321) is contrary to previous decisions of this Court."

Texas Eastern finds it difficult to understand this argument since it is clear that Judge Brown was not attempting to elaborate on any dichotomy between the powers of the Commission under Section 4 and Section 5 of the Act. Since Docket No. G-2019 involved a Section 4(e) rate increase filed by United while Docket No. G-1142 involved a Section 5(a) investigation of United's rates, he simply pointed out that the difference in the Commission's powers under each

of these sections of the Act was *one* of the factors which led to the conclusion that reference to Docket No. G-2019 in the subject settlement agreement was purposeful. His decision is based on the clear and unambiguous language of Finding (2)(ii) of the settlement of Texas Eastern's rate case in Docket No. G-1964, which was consented to by all parties, including the Columbia Companies. Texas Eastern submits that the refusal of the Court below to change the express terms of the settlement agreement is consistent with the decision in *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959), where this Court refused to change the terms of a consent decree, stating (360 U.S. at 23):

> "The Government contends that the interpretation it now offers would more nearly effectuate 'the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike.' This may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues. (Footnote omitted.) And we agree with the District Court that accepting the Government's present interpretation would do just that. Cf. Hughes v. United States, 342 U.S. 353, 96 L. ed. 394, 72 S. Ct. 306."

The Columbia Companies attempt to impugn the decision of the Court below on the ground that the Commission had the potential power in Docket No. G-2019 to reduce the rates charged Texas Eastern by United for gas delivered at Koscinsko, Mississippi, even though this was a Section 4(e) proceeding. However, this argument is entirely irrelevant because it is clear that the Commission did not undertake to reduce the Koscinsko rates in Docket No. G-2019 but did so on the basis of the Section 5(a) investigation of United's rates in Docket No. G-1142. In short, the argument of the Columbia Companies is nothing more than an academic discussion as to the Commission's potential power in Docket No. G-2019. Since the Commission did not attempt

to reduce United's Kosciusko rates in Docket No. G-2019, any argument as to the Commission's powers to order rate reductions in a Section 4(e) proceeding is immaterial to the actual facts of the present case and the Court's interpretation of Finding (2)(ii) of Texas Eastern's settlement in Docket No. G-1964.

3. The Contention of the Columbia Companies that the Decision of the Court Below Does Not Settle the Central Issues in this Case Is Not a Ground for Granting Certiorari

The Columbia Companies advance the somewhat novel argument that certiorari should be granted because the decision of the Court below does not settle "the central issues which are now ripe for consideration by this Court" (Pet., p. 20). They assert that the remand will give rise "to new peripheral issues entirely extraneous to Finding 2(ii)," such as the amount of interest due and the right of the Columbia Companies to have refunded to them at least the amounts they voluntarily refused to accept in settlement.

Texas Eastern submits that the Court below definitively and decisively resolved the central issue on this appeal, that is, Texas Eastern's refund and rate reduction obligations under Finding (2)(ii) of the settlement agreed to and approved in Docket No. G-1964. However, assuming *arguendo* that the contention of the Columbia Companies is correct, it does not provide a basis for this Court to grant certiorari. On the contrary, if the Court below has not decided the issues there is nothing for this Court to review.

In connection with the foregoing it should be noted that the Columbia Companies have now asserted before the Commission that although they voluntarily refused to settle on the same basis as Texas Eastern's other customers and

elected to litigate Texas Eastern's liability under Finding (2)(ii), they are entitled to refunds of the amounts tendered in settlement in order to avoid discrimination in the rates charged and received by Texas Eastern as a natural gas company. Briefs have been filed and this controversy is now pending before the Commission; certainly decision by this Court would be premature.

CONCLUSION

The arguments presented by the Columbia Companies in support of their petition were correctly disposed of by the Court below. They have failed to show any error in the Court's construction of the settlement agreement in Docket No. G-1964 which would warrant further review by this Court.

WHEREFORE, it is submitted that the Columbia Companies' petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated October 19, 1963.

PROOF OF SERVICE

I, David T. Searls, one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of October, 1963, I served copies of the foregoing Brief in Opposition to Petition for Certiorari by mailing copies thereof to counsel for Petitioners and the Federal Power Commission.

s/ DAVID T. SEARLS
David T. Searls